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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1-816~~ 70-271

MAROCEANO COMPANIA NAVIERA S.A.
as Owner of S. T. PENTELIKON,

Respondent,

—against—

S.S. VERDI, her engines, etc., and
ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE),

Petitioner.

ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE),
as Owner of S.S. VERDI,

Petitioner,

—against—

S.T. PENTELIKON, her engines, etc., and
MAROCEANO COMPANIA NAVIERA S.A.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE),

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as Owner of S.S. VERDI,

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—against—

S.T. PENTELIKON, her engines, etc., and
MAROCEANO COMPANIA NAVIERA S.A.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Italia Societa di Navigazione (Italian Line) respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 8, 1971.

Opinion Below

The opinion of the Court of Appeals is reported at 438 F.2d 854 and a copy is annexed hereto marked Appendix A. The opinion of the District Court for the Southern District of New York is reported at 312 F. Supp. 489 (1970).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on February 8, 1971. A timely petition for rehearing en banc was denied March 16, 1971, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether, in a crossing situation on the high seas at the western entrance to the Mediterranean, the holding-on vessel can, with impunity, maintain her course at full speed for approximately 2.5 minutes after her master realizes that danger of collision exists, that the giving-way vessel is coming on a collision course at undiminished speed, is ignoring the signals of the holding-on vessel, and that collision cannot be avoided by any action of the giving-way vessel alone.

2. Whether a vessel proceeding on a clear, dark night toward the entrance to the Mediterranean, where many other vessels are likely to be met, can be excused for failing to use her radar to determine the course and speed of the oncoming vessel, relying instead upon observation by seaman's eye, and misjudging the course of the other vessel by 60°.

Statutory Provisions Involved

The collision occurred in international waters, hence navigation was governed by the International Regulations for Preventing Collisions at Sea. Specifically, the following sections of United States Code Title 33 apply:

"§1081. Power-driven vessels crossing (Rule 19).

When two power-driven vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

"§1083. Vessels having right of way; duty in aiding to avert collision (Rule 21).

Where by any of sections 1061 to 1094 of this title one of two vessels is to keep out of the way, the other shall keep her course and speed. When, from any cause, the latter vessel **finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision** (see sections 1089 and 1091 of this title)." (emphasis added)

"§1089. Special circumstances requiring departure from rules to avoid immediate danger (Rule 27).

In obeying and construing sections 1061 to 1094 of this title due regard shall be had to all dangers of navigation and collision, and to any special circumstances, including the limitations of the craft involved, which may render a departure from such sections necessary in order to avoid immediate danger."

"§1091. Usual additional precautions required generally (Rule 29).

Nothing in sections 1061 to 1094 of this title shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

Statement of the Case

This admiralty case arises out of the collision between two large ocean-going vessels, the VERDI a passenger ship and the PENTELIKON a tanker, which occurred on the west side of the entrance to the Strait of Gibraltar at 0143 hours April 16, 1964. The night was dark but clear, with good visibility. Respondent's PENTELIKON was on an easterly course making full speed of 16-17 knots while petitioner's VERDI was on a southwesterly course proceeding diagonally across the Strait also making about 17 knots.

The PENTELIKON sighted the VERDI bearing approximately 38° on her port bow at 0135,* or eight minutes before collision. PENTELIKON's Master estimated that the VERDI was on a southerly heading (190°) whereas, in fact, as shown by VERDI's automatic course recording device, she was heading southwesterly (about 250°). The error amounted to approximately 60°, a critical miscalculation as

* This is the finding of the Trial Court and was not disturbed by the Court of Appeals. However, the uncontradicted testimony of the Master of the PENTELIKON is that he first sighted the VERDI about 0132 distant approximately 6 miles.

proven by subsequent events. As the burdened vessel in a crossing situation, VERDI was required under International Rules to keep out of the way of the PENTELIKON (33 U.S.C. §1081).

Continuing to observe the VERDI, PENTELIKON's Master saw that the bearing remained constant, a sure sign of danger. Accordingly, at 0137 he flashed by blinker light the letter "U", an International Code Signal meaning "You are standing into danger." There was no response from the VERDI, which appeared to be proceeding as before. At 0140, or three minutes before collision, the Master of the PENTELIKON became alarmed. The vessels were then only approximately a mile apart and there was no indication that the VERDI had any intention of complying with her duty to keep clear or, indeed, that she was even aware of PENTELIKON's presence. Accordingly, he again flashed "U" and also sounded five short blasts on the whistle, the international danger signal. Still there was no response from VERDI. At this time, as the District Court found and the Court of Appeals agreed, the vessels were *in extremis, viz.* they had reached the point where under International Rule 21 (33 U.S.C. §1083) the holding-on vessel was required to act. The District Court found as a fact that PENTELIKON waited "several minutes" beyond this point before taking any avoiding action and held PENTELIKON at fault on this account.*

The Court of Appeals reversed and exonerated the PENTELIKON despite her delay of "several minutes". The Court said:

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*The VERDI conceded fault prior to trial and the only issue before the Court was whether PENTELIKON was also at fault, requiring an equal division of all damages.

> "The Trial Court held that when the in extremis point was reached, the PENTELIKON was obliged to 'take some affirmative action toward avoidance of the collision.' But if this were her duty, she satisfied it by veering off to starboard and reversing her engines, . . ."

But she did not take this action until seconds before collision, 2½ minutes after her master realized that VERDI alone could not avoid collision.

The District Court also held the PENTELIKON at fault for failing to use her radar which was available and in good order. That Court pointed out that radar could have given those in charge of the PENTELIKON the exact course, speed and distance of the VERDI, and that prudence and good seamanship dictated its use. The Court of Appeals reversed on this ground also, stating that the master of the PENTELIKON was entitled to rely on his visual estimates even though they were grossly wrong and plainly contributed to the collision.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decisions of this Court, of other Circuit Courts and of British Courts.

The holding of the Court of Appeals that the privileged vessel in a crossing situation may continue on without changing course or speed for several minutes beyond the *in extremis* point and almost to the very moment of impact is clearly in conflict with the holdings of this Court. In *Postal S. S. Corp.* v. *El Isleo*, 308 U.S. 378, 387 (1940), this Court said:

> "The so-called privileged vessel has no absolute right to keep her course and speed regardless of the danger involved in that action. Her right to maintain her privilege ends when there is danger of collision . . ."

In *The Delaware*, 161 U. S. 459, 468 (1896), this Court said:

> "The duty of a steamer having the right of way, when approaching another steamer charged with the obligation of avoiding her, has been the subject of much discussion both in the English and American courts. That her primary duty is to keep her course is beyond all controversy. It is expressly required by the 19th Rule of the original International Code, (Rev. Stat. Section 4233), and of the 16th Rule of the Revised Code of 1885, and doubtless applies *so long as there is nothing to indicate that the approaching steamer will not discharge her own obligation to keep out of the way.* The divergence between the authorities begins at the point where the master of the preferred

steamer suspects that the obligated steamer is about to fail in her duty to avoid her. The weight of English, and, perhaps, of American authorities, is to the effect that, if the master of the preferred steamer has any reason to believe that the other will not take measures to keep out of her way, he may treat this as a 'special circumstance,' under Rule 24, 'rendering a departure' from the rules 'necessary to avoid immediate danger.' Some even go so far as to hold it the duty of the preferred vessel to stop and reverse, when a continuance upon her course involves an apparent danger of collision . . ." (emphasis added)

In *The New York*, 175 U. S. 187, 205 (1899), this Court said:

> "Her only excuse for her omission is that she was the preferred vessel within the nineteenth American and sixteenth Canadian rule, and that by the twenty-third American and twenty-second Canadian rule, it was her duty to keep her course. But the fact, that a steamer is entitled to hold her course does not excuse her from inattention to signals, from answering where an answer is required, *or from adopting such precautions as may be necessary to prevent a collision, in case there be a distinct indication that the obligated steamer is about to fail in her duty.*" (emphasis added)

The Court of Appeals' ruling is also in conflict with the decisions of other Circuits. In *The West Hartland*, 2 F. 2d 834 (9 Cir. 1924), the Trial Court held the privileged vessel at fault for failing to take timely avoiding action in the face of obvious danger. The Ninth Circuit affirmed, saying (p. 836):

"For some considerable time before the collision, the master of the West Hartland was in doubt as to the course the Governor intended to pursue, and under such circumstances it was his plain duty to solve that doubt in favor of safety by giving a danger signal or taking timely steps to avoid a collision before plunging his vessel into a position where a collision would be the natural, if not the necessary, consequence."

In *City of Chester*, 78 Fed. 186 (4 Cir. 1897), the Trial Court found the burdened vessel solely at fault. Upon appeal, the Fourth Circuit reversed, holding the privileged vessel at fault as well, saying (pp. 188-9):

"But the Pinner's Point [the privileged vessel] was not free from fault. The paramount duty of every vessel in proximity to another vessel is to avoid the risk of collision, and to take every precaution to this end; and in harbors this duty is intensified, the utmost care and vigilance being imperatively required from all vessels. The rules of navigation are prescribed for the purpose of governing the action of approaching vessels in all ordinary cases. But notwithstanding the minute provisions of these rules, in construing and obeying them, due regard must be had to all dangers of navigation, and to any special circumstances existing in any particular case, which may render a departure from them necessary in order to avoid immediate danger. Rule 24; The America, 92 U.S. 432. In the present case the Pinner's Point, under rule 19 (now 16), had the right of way, and under normal circumstances should have proceeded on her course. But this did not free her from obligation to take every care, and so to conduct herself as to

avoid a course involving risk of collision. Even the fault of the other vessel could not free her from this."

The Court of Appeals' ruling is also in conflict with the English cases construing the International Rules. In *The Otranto* [1931] App. Cas. 194, the House of Lords held the privileged vessel at fault for waiting too long before stopping and reversing her engines. Lord Buckmaster in delivering the opinion of the Court quoted with approval other British authorities as follows (pp. 201-2):

> "This is in close accordance with the view expressed by Lord Herschell in The Tasmania (1), where he says: 'as soon then as it was, or ought to a master of reasonable skill and prudence to have been, obvious that to keep his course would involve immediate danger, it was no longer the duty of the master of the Tasmania to adhere to the 22nd [now the 21st] Rule. He was not only justified in departing from it, but bound to do so, and to exercise his best judgment to avoid the danger which threatened,' and again with Vaughan Williams L.J. in the Hawke (2), where he says: 'I am inclined to think that in a case where good seamanship would assume the collision cannot be avoided by the action of the giving-way vessel alone, the case falls within the exception'—namely, the exception to the rule to keep course and speed—'even though in fact the giving-way vessel could by her own action have averted collision.'"

See also *The Etna,* 11 Asp. 30 [1907].

Finally, the Court of Appeals' decision is at odds with other decisions of the Second Circuit. In *The George S.*

Shultz, 84 Fed. 508, 512 (1898), the Court affirmed the Trial Court's decision of both to blame as follows:

> "[T]he finding of fault is clearly sustained by the proof. The period of uncertainty as to what the burdened vessel meant to do which is referred to in The Britannia, 153 U.S. 130, 14 Sup. Ct. 795, The Northfield, 154 U.S. 629, 14 Sup. Ct. 1184, and The Delaware, 161 U.S. 469, 16 Sup. Ct. 516, had passed. It was plainly manifest to the pilot of the Little Silver [the privileged vessel] that the Shultz had gone so far on her improper course that it was absolutely impossible for her, either by changing course or stopping or reversing, to keep her tow out of the way of the Little Silver . . ."

See also *The Mauch Chunk,* 154 Fed. 182 (2 Cir. 1907); *The Comus,* 19 F.2d 774, 777 (2 Cir. 1927).

It is ironic that it was also the Second Circuit which said in *Yang-Tsze Ins. Ass'n* v. *Furness, Withy & Co.,* 215 Fed. 859, 864-5 (1914):

> "The two vessels involved were steamers, and therefore could be maneuvered more easily than any other kind of vessels. They were in plain sight of each other when miles apart. They nevertheless came into collision and with such force that one of them sank in a few hours, carrying down with her the entire cargo. It is difficult to see how it all happened unless both vessels were in fault and failed to exercise reasonable care. Plain common sense constrains one to such a conclusion. To exonerate either of them under such conditions can be justified only if upon the closest scrutiny of the navigation of each vessel it can be discovered that one of them was free from all culpable blame. We have

examined the evidence in the case with care, and we have not been satisfied that either one of these vessels was free from fault. The vessels that navigate the high seas, and indeed vessels that navigate inland waters, intrusted with human lives and property of great value, must be held to the strictest standards of conduct, and when they fail to observe the requirements which the maritime law of the nations has prescribed, are to understand that they must abide the consequences."

2. The decision below raises an important question of maritime law which has not been, but should be, settled by this Court.

The Court of Appeals has decided for the first time that in clear weather, at night, a ship proceeding at sea need not use her radar but may, indeed *must,* rely solely on visual estimates. The exact words of the Court are:

"Radar is a useful electronic device for detecting the presence, and plotting the course, of other vessels, particularly in a fog or in weather reducing visibility but on a clear night with high visibility it would not have been superior to, or even effective as, the human eye. The master of the Pentelikon had the Verdi under observation and in plain sight for some time. Radar could not have given him the position of the Verdi more accurately (if as accurately) as he from his position on the bridge could determine it. In fact had he left the bridge to observe through a radar what he had been observing over the last many minutes before the collision, he might well have been charged with negligence."

No authority is cited for this startling pronouncement, which is not only egregiously wrong but also is clearly a backward step in promoting safety of life at sea. First, the Court's statement as to the value of visual estimates is at odds with human experience, for such estimates have long been known to be notoriously unreliable, especially at night, *The Georgic*, 180 Fed. 863, 867 (S.D.N.Y. 1910); *The Sarmartian*, 2 Fed. 911, 914 (Cir. Ct. of Md., 1880). Second, it was not necessary, as the Court says, for the master to leave the bridge of his ship. On the PENTELIKON, as on all vessels, the radar was located in the wheelhouse on the bridge, ready at hand for immediate use. Indeed, there was no need for the master himself to look at the radar at all. He could have assigned this duty to the mate who was on watch, which is normal procedure.

In *Afran Transport Co.* v. *The Bergechief*, 274 F.2d 469, 473-4 (2 Cir. 1960), the Court correctly described radar as "an electronic method of detecting objects and ascertaining their range and bearing." Thus, the great contribution of radar is that the navigator can quickly obtain the *exact* distance of another vessel and by observing these distances over a brief period of time can ascertain her course and the rate at which the two vessels are closing. Here the master of the PENTELIKON misjudged the VERDI's course by 60°. He thought the VERDI was moving straight across PENTELIKON's path, from left to right, whereas in fact, she was coming *toward* the PENTELIKON at a rapid rate. Radar would quickly have given him this information. Yet, the decision of the Second Circuit is practically a mandate to ignore radar in clear weather.

Marine casualties are occurring with greater frequency, resulting in loss of life, oil pollution and property damage.

These conditions should compel a strict adherence to navigation rules in conjunction with the use of all navigation aids available to the ship master. Until this decision there had been a strong judicial trend toward the required use of radar at night, even in clear weather, *The Glenville,* 210 F. Supp. 865 (S.D. Tex. 1962); *The Willowpool,* 214 F. Supp. 449 (E.D. Tex. 1963); *The Marine Leopard,* 152 F. Supp. 197, aff'd 279 F.2d 662 (9 Cir. 1960), and we submit that such decisions are an appropriate response by the Courts to a very serious safety problem. The Second Circuit has now reversed that trend by instructing those who are charged with the navigation of vessels on the high seas that they are not required to use radar at night in clear weather and might even be found guilty of negligence if they do.

We urge this Court to right this wrong. It has been over 30 years since the Court has reviewed a maritime collision case, *Postal S.S. Corp.* v. *El Isleo,* 308 U.S. 378 (1940). Since that time great changes have occurred in the maritime industry, including the development and installation of radar on practically all ocean-going vessels. Guidance from this Court on this far-reaching question is needed now. The Courts of Appeal should not be permitted to assume that their aberrations will pass unnoticed and uncorrected.

In addition, this Court should reaffirm its earlier decisions strictly applying the International Rules. The size and speed of today's vessels demand careful adherence to these rules and a statement from this Court to that effect will go a long way toward promoting safety of life and property at sea.

CONCLUSION

For these reasons the writ of certiorari should be issued to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

EUGENE UNDERWOOD
25 Broadway
New York, New York 10004

June 3, 1971.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 396-97—September Term, 1970.

(Argued January 7, 1971 Decided February 8, 1971.)

Docket Nos. 35106, 35202

MAROCEANO COMPANIA NAVIERA S.A.
as Owner of S. T. PENTELIKON,

Plaintiff-Appellant,

—against—

S.S. VERDI, her engines, etc., ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE),

Defendant-Appellee.

S.S. VERDI, her engines, etc., ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE),

Plaintiff-Appellant,

—against—

MAROCEANO COMPANIA NAVIERA S.A.
as Owner of S. T. PENTELIKON,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge;*
MOORE and SMITH, *Circuit Judges.*

Appeal by Maroceano Compania Naviera S.A. as Owner of the S. T. Pentelikon from an interlocutory decree, John M. Cannella, *Judge*, holding the Pentelikon and the S.S. Verdi owned by Italia Societa di Navigazione equally at fault, and dividing equally the damages sustained as the result of a collision. The Verdi appealed from a failure to award pre-judgment interest against the Pentelikon.

The decree of holding the vessels equally liable is reversed, and a decree holding the Verdi solely liable should be entered with costs to appellant Pentelikon; appeal as to pre-judgment interest dismissed as moot. Remanded for further proceedings.

NICHOLAS J. HEALY, New York, N. Y. (Healy & Baillie, New York, N. Y., Allan A. Baillie and John C. Koster, New York, N. Y., of counsel), *for Maroceano Compania Naviera S.A. as Owner of S. T. Pentelikon.*

EUGENE UNDERWOOD, New York, N. Y. (Burlingham Underwood Wright White & Lord, New York, N. Y., Kenneth H. Volk and Frank L. Wiswall, Jr., New York, N. Y., of counsel), *for Italian Line and the S.S. Verdi, her engines, etc.*

MOORE, *Circuit Judge*:

These consolidated actions arise out of a collision in the early morning of April 16, 1964 between the "Pentelikon," a single screw steam turbine driven oil tanker owned by Maroceano Compania Naviera S.A., and the "Verdi," a twin screw passenger and freight vessel owned by Italia Societa di Navigazione. The parties will be designated by

the names of the vessels owned by them, respectively. The trial court found both vessels equally at fault and held that damages and costs be divided equally. The Verdi was awarded interest at 6% from May 8, 1970. From this judgment the Pentelikon appeals, claiming that the Verdi was solely at fault. The Verdi seeks to modify the judgment by claiming pre-judgment interest. The pre-trial order narrowed the issues in that the Verdi admitted fault but asserted that the Pentelikon was also at fault.

On the night (April 15-16, 1964) the Pentelikon was proceeding in an easterly direction (course 090) through the Strait of Gibraltar towards the Mediterranean Sea, her speed over the ground was approximately 13 knots. The Verdi was headed for the Atlantic Ocean in a southwesterly direction (course 242) at a speed through the water of some 17 knots. The weather was clear and the visibility good. The Pentelikon sighted the Verdi at 0135 hours. As the Trial Court found, "The courses of the two vessels were such that there was a crossing situation with the Pentelikon the privileged vessel." The Pentelikon "after having sighted the Verdi, maintained her course of 090 up until the time she was *in extremis* as was required of her by the International Rules of the Road, Rule 21.", namely, where "one of two vessels [here the burdened vessel Verdi] is to keep out of the way, the other [Pentelikon] shall keep her course and speed." Thus the Pentelikon properly conformed to the navigational rule she was required to follow.

While the Pentelikon was thus proceeding, the master of the Verdi "became concerned with the Pentelikon and the risk of collision." "Since the Verdi was the burdened vessel under the Crossing Rule (Rule 19), she should have taken early action to avoid the Pentelikon, slackened her

speed, stopped, or reversed, or taken other action to avoid the collision or crossing ahead of the Pentelikon. She did none of these things."[1]

As the vessels approached each other, the Pentelikon flashed a "U" signal, meaning, "You are standing into danger."[2] No action having been taken by the Verdi, a second "U" signal was flashed and the danger warning was sounded on the Pentelikon's whistle. The vessels were then *in extremis* and the Pentelikon took affirmative action to avoid a collision by turning to starboard and by ringing down full speed astern.

Even then "this collision might have been avoided had the Verdi taken the action required of her,". However, she did not. Instead she compounded her faulty navigation. As the Trial Court found, "The Verdi was also at fault for turning to port in her last maneuver and thus tending to cross ahead of the Pentelikon instead of turning to starboard, which would have tended to have her pass astern of the Pentelikon."

In the face of such overwhelming proof that the Verdi's actions were the cause of the collision, upon what grounds did the Trial Court rest its conclusion of equal liability? The Trial Court held that when the *in extremis* point was reached, the Pentelikon was obliged "to take some affirmative action toward avoidance of the collision." But if this were her duty, she satisfied it by veering off to starboard and reversing her engines, whereas the Verdi, which could have avoided a collision, took affirmative action by turning in the wrong direction, thus colliding with the Pentelikon. The Trial Court found that the Pentelikon should have taken action after she had blown the danger signal

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1 Quotations from Trial Court's findings in opinion.

2 International Code of Signals, H.O. 103.

but she had every right to expect that the Verdi would heed the danger signal and maneuver properly. Nothing that the Pentelikon could have done could have avoided the collision in the light of the Verdi's unexpected turn to port. The Trial Court speaks of the Pentelikon's failure "to justify her conduct of inaction" but, first, there was no inaction and, second, the burden of justification was not on the privileged vessel.

The Trial Court also found the Pentelikon at fault for not using its radar. Radar is a useful electronic device for detecting the presence, and plotting the course, of other vessels, particularly in a fog or in weather reducing visibility but on a clear night with high visibility it would not have been superior to, or even effective as, the human eye. The master of the Pentelikon had the Verdi under observation and in plain sight for some time. Radar could not have given him the position of the Verdi more accurately (if as accurately) as he from his position on the bridge could determine it. In fact had he left the bridge to observe through a radar what he had been observing over the last many minutes before the collision, he might well have been charged with negligence. There was no causal connection whatsoever between the failure to observe the Verdi through a radar screen rather than by visual sighting and the collision. See *White Stack Towing Corp.*, 279 F.2d 419 (4th Cir. 1960).

The Trial Court in proper recognition of the role which hindsight plays in these collision cases said that it was unfortunate that "the masters of these two vessels did not have their able counsels' assistance available to them on the night of April 16, 1964." Equally unfortunate was the lack of a library of this Circuit's decisions available on the bridge because counsel for the Verdi could have

read to the master from this Court's decisions in *Hellenic Lines* v. *The Exmouth*, 253 F.2d 473 (2d Cir. 1958), *cert. denied*, 356 U.S. 967 (1958) and *Northern Petroleum Tank S.S. Co.* v. *City of New York*, 282 F.2d 120 (2d Cir. 1960). By coincidence, the factual situations in both cases were almost identical to the present case. In both cases the trial court held each vessel to have been at fault and in each case this court reversed the finding of equal liability.

In *Northern Petroleum* this court said as to the "Tynefield" [corresponding to the "Pentelikon" here]:

> "• • • The entire purpose of any navigational rule is to create as much certainty as possible so that each vessel can conduct itself accordingly. The Tynefield had a right (even a duty as well) to maintain its course until collision appeared likely. The Dongan Hills was under an obligation to avoid a collision by obeying the rule and the Tynefield had a right to expect that she would do so. • • •
>
> "In view of this long recognized navigational rule and the importance of strict adherence thereto, the trial court's conclusions that 'Regardless of the right and privilege of the Tynefield to maintain her course and speed there was a continuing duty on her part to exercise care to avoid collision until the crossing was safely effected'; that the Tynefield 'failed to change her course and speed until too late'; and 'took no precaution to avoid the impending collision until it was too late, relying recklessly on its privilege in this crossing situation' are not in accord with the law. It was not reckless for the Tynefield to rely on its privilege. To the contrary she was obliged under the Rule to maintain her course (The Delaware, 1896, 161 U.S. 459, 16 S. Ct. 516, 40 L. Ed. 881). She cannot be charged with any

failure to change her speed and course when to have done so would have violated the Rule. Nor did she have any reason to believe that the Dongan Hills would not comply with the Rule. It was the Dongan Hills' duty to change her course and speed (if necessary) to avoid collision, * * * ."

In the *Hellenic Lines* case, the Hellenic (Pentelikon) and the Exmouth (Verdi) sighted each other at some distance on a clear night. The Hellenic was the privileged vessel and held her course to almost the last minute as here. She gave proper whistle signals and finally the danger alarm, then turned hard right and reversed—all as did the Pentelikon. There, too, was involved a reversal of the trial court's finding of equal liability and a holding by this court of sole liability on the part of the Exmouth.

The Trial Court's conclusion of the Pentelikon's fault *in extremis* is also inconsistent with this Court's decision in *The Stifinder,* 275 F. 271 (2d Cir. 1921), where the Court said:

"The Stifinder's duty was to keep her course and speed in the expectation that the Selje would obey the law and keep out of the way. When it became apparent that the steamer did not intend to conform to the law, the vessels were then in extremis, and what was done or omitted to be done by The Stifinder in the agony of collision can make no difference, as it is impossible to consider a decision so made as a fault. * * * "

If, as the Trial Court here indicated, the Verdi's action in turning to port instead of to starboard (the actual cause of the collision) "may be excusable in view of the fact that the vessels at that time were *in extremis,* so much the more were the Pentelikon's actions when this point was reached.

Upon the law and the facts, the court concludes that the Verdi was solely at fault. The decree appealed from is reversed with costs with the question of damages and the proceedings for the ascertainment thereof to be decided by the Trial Court. The appeal as to pre-judgment interest is dismissed.